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Attorneys for Creditor
 Debt Acquisition Company of America V

UNITED STATES BANKRUPTCY COURT

District of Nevada

In re	)	Case No. BK-S-06-10725 LBR
USA COMMERCIAL MORTGAGE COMPANY)	
Debtor.	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN OPPOSITION TO
In re	)	DEBTOR'S MOTION TO SELL UNDER
USA CAPITAL REALTY ADVISORS, LLC	)	SECTION 363 ALL COMMERCIAL
Debtor.	)	MORTGAGE ASSETS OF DEBTOR USA
	)	COMMERCIAL MORTGAGE COMPANY
In re	)	IN THE PLACER VINEYARDS LOANS
USA CAPITAL DIVERSIFIED TRUST FUND, LLC	)	TO COMPASS USA SPE, LLC
Debtor.	)	INCLUDING REQUEST FOR
	)	RECONSIDERATION OF ORDER
In re	)	SHORTENING TIME
USA CAPITAL FIRST TRUST DEED FUND, LLC	)	[AFFECTS DEBTOR USA COMMERCIAL
Debtor.	)	MORTGAGE COMPANY]
	)	DATE: March 27, 2007
In re	)	TIME: 9:30 a.m.
USA COMMERCIAL MORTGAGE COMPANY)	
Debtor.)	
Affects:)	
<input type="checkbox"/> All Debtors)	
<input checked="" type="checkbox"/> USA Commercial Mortgage Company)	
<input type="checkbox"/> USA Capital Realty Advisors, LLC)	
<input type="checkbox"/> USA Capital Diversified Trust Fund, LLC)	
<input type="checkbox"/> USA Capital First Trust Deed Fund, LLC)	
<input type="checkbox"/> USA Securities, LLC)	

1 I. INTRODUCTION

2 The instant motion to sell the Debtor's loan servicing rights in the two (first and second trust
3 deed) loans secured by the property known as "Placer Vineyards" was filed on drastically shortened time
4 without an adequate showing of an emergency justifying this action. The shortened time not only affects
5 the ability of parties in interest to oppose the motion, it also handicaps the ability of prospective bidders
6 to investigate and prepare a bid.

7 Debt Acquisition Company of America opposes the motion both in its capacity as a creditor and
8 also as a prospective bidder which has been excluded as a practical matter from conducting due
9 diligence and preparing to bid. DACA's arguments in opposition are summarized as follows:

- 10 ● The Order Shortening Time (an interlocutory order which DACA requests be reconsidered) was
11 improvidently granted, because there was no showing of an emergency justifying shortened
12 time.
- 13 ● The Motion does not make any showing as to the reasonableness of the proposed opening bid.
14 Supporting information should include for example the amounts of what are referred to in the
15 Motion as: (i) Default Rate Interest; (ii) Accrued Servicing Fees; (iii) Late Charges; and (iv)
16 Success Fees; as well as any facts indicating that these amounts are or are not well secured by
17 the subject property. This information would also be vital to any prospective bidder.
- 18 ● The Motion does not make any showing as to the efforts of the Debtor to provide information
19 to or notify other prospective bidders, including for example those parties who bid or attempted
20 to bid at the previous sale (e.g., Silver Point, Desert Capital).
- 21 ● The Notice of Hearing does not make clear to Direct Lenders an intention to transfer the Loan
22 Servicing Agreements free and clear of the rights of the Direct Lenders as counterparties to those
23 agreements, thereby creating a legal uncertainty which will likely chill the bidding. If a
24 reasonable time is allowed before an auction, DACA proposes to use that time to try to obtain
25 the consent of the Direct Lenders to the transfer of the loan servicing rights.

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- 1 • The assets proposed to be sold are not property of the bankruptcy estate but instead are vested
2 in the USACM Liquidating Trust free and clear of interests under 11 U.S.C. § 1141(c). Counsel
3 for DACA cannot find provisions of the Plan or the Confirmation Order that purport to preserve
4 power in the Liquidating Trust to sell assets free and clear of any other rights of the Direct
5 Lenders.
- 6 • Any proposed sale which occurs without the consent of the Direct Lenders is subject to the same
7 legal defects raised in opposition to confirmation of the earlier sale to Compass Partners under
8 the Plan.

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10 **II. DACA REQUESTS THAT THE COURT RECONSIDER AND**
11 **MODIFY THE ORDER SHORTENING TIME**

12 This Motion (Docket No. 3037) was originally filed on March 9. It refers to a hearing date of
13 March 15, but no notice of hearing was apparently filed or served on anyone. An Application for Order
14 Shortening Time (Docket No. 3095) was filed on Thursday, March 15, and the OST was ultimately
15 entered on Friday, March 16, scheduling submission of bids for Friday, March 23 (five business days
16 later). The Notice of Hearing (Docket No. 3097) was mailed without copies of any other papers to the
17 Direct Lenders on Thursday, March 15, and purports to require them to file written opposition to the
18 Motion no later than Tuesday, March 20 (five business days before the hearing) (see Certificate of
19 Service, Docket No. 3126).

20 It was not within the bounds of due process to notify 343 Direct Lenders by first class mail and
21 require them to file an objection to the Motion within three business days *after mailing*. It is similarly
22 not within the bounds of commercial reasonableness to expect any prospective bidder to make a business
23 decision on a \$300,000 purchase within five business days, especially when the Motion itself omits the
24 basic information that the bidder would need in order to determine the value of what the Debtor is
25 purporting to sell.

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1 The Application for Order Shortening Time and the supporting McPherson Declaration do not
 2 even assert that any emergency exists which may be balanced against the harm inherent in placing both
 3 the Direct Lenders and prospective bidders at such a disadvantage. The McPherson Declaration
 4 explains that funds will be needed post-foreclosure to complete the Placer Vineyards project, but the
 5 need for those funds is speculative (depending on the outcome of the foreclosure process) and many
 6 months in the future. What might happen at a foreclosure sale which might be scheduled for this fall
 7 was not cause to shave two weeks off the time which Direct Lenders and prospective bidders had to
 8 respond to the Motion and participate in the auction.

9 Provided that it receives timely information from the Debtor, DACA will be in a position to enter
 10 competitive bidding on the Placer Vineyards loan servicing rights by April 10. DACA requests that the
 11 date for submission of bids be continued until that time, with the hearing on the Motion to follow shortly
 12 thereafter. That schedule would be in line with the Court's normal motion procedures. No cause has
 13 been demonstrated to alter those procedures in this case.

14
 15 **III. THE MOTION MAKES NO SHOWING AS TO THE
REASONABLENESS OF THE OPENING BID**

16 The Motion proposes to sell a bundle of rights, referred to as the "Placer Vineyards Commercial
 17 Mortgage Assets" which include "without limitation, the servicing agreements (the "Servicing
 18 Agreements") relating to the Placer Vineyards Loans, any and all Default Rate Interest (as defined in
 19 the Compass APA) for the Placer Vineyards Loans, any and all Accrued Servicing Fees (as defined in
 20 the Compass APA) for the Placer Vineyards Loans, any and all Late Charges (as defined in the Compass
 21 APA) for the Placer Vineyards Loans, any and all Success Fees (as defined in the Compass APA) for
 22 the Placer Vineyards Loans, and other fees and sums due the loan servicer under the Servicing
 23 Agreements, as well as all proceeds and receivables related solely to USACM's participation interest
 24 as a Direct Lender in the Placer Vineyards Loans (if any)." (Motion p. 4).

25 What is purportedly being sold is the opportunity to collect these various items and to retain
 26 them as part of the servicing agent's fee. The value of that opportunity largely depends on whether there
 27 is sufficient value in the property to secure those amounts.

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1 At a minimum, creditors deserved to be advised in the moving papers as to the amount of default
 2 interest and late charges (as well as accrued servicing fees and success fees) which are being sold as to
 3 these two loans. This is the only way for anyone (including this Court) to gauge whether the proposed
 4 purchase price is fair.

5 The very same information is basic to anyone who might even consider bidding on this asset.
 6 Also important would be any information which the Debtor obtained as to the value of the Placer
 7 Vineyards property. Valuation information would demonstrate whether the default interest and late
 8 charges will ultimately be collected. If collection of these sums is a virtual certainty in the long run,
 9 then the total which will be collected ought to compare favorably with the purchase price negotiated
 10 with Compass. If the price negotiated with Compass is much lower than the default interest and related
 11 charges, then this sale should be attractive to other bidders.

12 IV. THE MOTION CONTAINS NO SHOWING AS TO MARKETING EFFORTS

13 The Motion asks the Court to confirm the results of an auction to be held on March 21. Central
 14 to the concept of a commercially reasonable auction is that an effort is made to notify prospective
 15 bidders of the date time and place of the auction, and of any facts not generally available that would
 16 affect the decision of a party to bid. Without those things, an auction cannot be relied upon to secure
 17 the best available price for the seller.

18 In this case, Compass was not the only bidder for the original package of Loan Servicing
 19 Agreements. The disappointed stalking horse bidder was SPCP Group, LLC ("Silverpoint"). Another
 20 prospective bidder, Desert Capital REIT, also attempted to qualify to bid. At the time that this Motion
 21 was filed, the Debtor knew that DACA had already been designated as the substitute servicing agent
 22 under one of the loans, known as Fiesta Oak Valley. Yet, DACA was not contacted by the Debtor to
 23 attempt to obtain an offer to purchase the Placer Vineyards servicing rights.

24 The relatively small size of the Placer Vineyards sale might make the loan servicing rights
 25 attractive to a whole host of Nevada-licensed mortgage loan brokers. The Motion does not indicate that
 26 any attempt was made to notify any Nevada or California mortgage loan broker that the servicing rights
 27 for the Placer Vineyards loans were for sale.

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1 V. THE NOTICE OF HEARING IS DEFECTIVE

2 The Motion states that the sale of the Placer Vineyards loan servicing rights will be under the
 3 same terms as those contained in the Asset Purchase Agreement filed with the Court on December 18
 4 in connection with the previous sale (Docket No. 2164). The Asset Purchase Agreement provides
 5 generally that an order approving the sale must include the provision that the Assets are sold "free and
 6 clear of all liens, claims, interests, obligations and encumbrances whatsoever under Section 363."
 7 However, it goes on to require in addition (in section 5.2) that any order confirming the sale shall
 8 "determine" that "the Purchaser is not a successor to Sellers or otherwise liable for any liabilities not
 9 expressly assumed and to the extent permitted by applicable law enjoining each and every holder of a
 10 claim for such liabilities from commencing, continuing or otherwise pursuing or enforcing any remedy,
 11 claim, cause of action or encumbrance against Purchaser or the Assets"

12 It is at least possible, by referring back to other pleadings which are themselves referred to in
 13 the Motion, for an interested party to determine that the Debtor intends to submit an order which
 14 purports to eliminate the rights and defenses of the Direct Lenders on the Loan Servicing Agreement
 15 based on material breaches by the Debtor. However, the Notice of Hearing, the only document served
 16 on the Direct Lenders, makes no reference to this intention. The Notice of Hearing merely states that
 17 the Assets are being sold "free and clear of all liens, claims, encumbrances and interests." Fairly read,
 18 the Notice of Hearing does not suggest that the rights of the Direct Lenders under the Loan Servicing
 19 Agreements are being otherwise altered or curtailed in any way.

20 DACA admits that under 11 U.S.C. § 1141(c) the property dealt with by the Plan reverts in the
 21 Debtor "free and clear of all claims and interests of creditors, equity security holders, and of general
 22 partners in the debtor." However, the Direct Lenders' rights under the Loan Servicing Agreements are
 23 not "liens, claims, encumbrances and interests" which are within the ambit of section 363. Any relief
 24 in addition to what has already been accomplished under section 1141(c) is not only improperly noticed,
 25 it is impossible in any case.

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1 The ideal way for any prospective purchaser to acquire the loan servicing rights would be to
 2 purchase those rights *with the informed consent of the Direct Lenders*, not by concealing from them
 3 what is going on. If additional time is granted for bidding, this is what DACA would propose to do.
 4 DACA would attempt to obtain from the Direct Lenders consents to the transfer of the loan servicing
 5 rights to DACA, contingent on DACA being the successful bidder. If it obtains these consents in
 6 advance, DACA would be prepared to bid more than it would be prepared to bid in the present situation.

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 8 VI. THIS ASSET MAY NOT BE SOLD FREE AND CLEAR OF ANY RIGHTS OF THE DIRECT
LENDERS OTHER THAN HAS ALREADY OCCURRED UNDER 11 U.S.C. § 1141(c)

9 Section 363 provides in part that “the trustee” may sell assets free and clear of interests. Unless
 10 counsel for DACA misunderstands, the current status of this case is that the Effective Date of the Plan
 11 has passed, the Debtor in Possession no longer exists, and the assets of the bankruptcy estate have been
 12 vested in the USACM Liquidating Trust. Generally, the Debtor’s administrative power to sell an asset
 13 free and clear of interests under 11 U.S.C. § 363(f) does not apply post-confirmation. *In re Golf, LLC*
 14 322 B.R. 874, 877 (Bankr. Neb. 2004). As far as counsel can determine, the Plan does not even purport
 15 to transfer to the Liquidating Trust the right to sell free and clear under section 363(f).

16 Therefore, whatever ability the Liquidating Trust now has to sell the subject property is confined
 17 to selling exactly what the Liquidating Trust was vested with under 1141(c). Further relief relating to
 18 the rights of the Direct Lenders under the Loan Servicing Agreements, like that provided for in the Asset
 19 Purchase Agreement, is not possible.

20
 21 VII. THE SALE IS SUBJECT TO THE SAME LEGAL DEFICIENCIES
AS THE ORIGINAL SALE TO COMPASS

22 DACA will not burden the Court by repeating in detail its objections which were raised in
 23 connection with the first sale to Compass. (See DACA’s opposition to plan confirmation, Docket No.
 24 2050). The Court ruled against DACA as to these matters, but its ruling is currently on appeal. DACA
 25 reserves the same objections as to this sale. The Loan Servicing Agreements are executory contracts.
 26 Because these contracts were not assumed under the Plan they are deemed rejected. Rejection of the
 27 contract constitutes a material breach as of the date of filing of the petition. A material breach of a
 28 contract excuses performance of the counterparty.

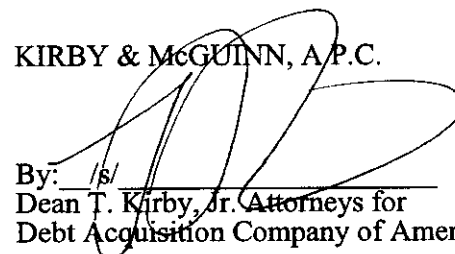
1 Further, and regardless of whether the Loan Servicing Agreements are deemed executory, these
2 contracts must be assigned subject to all of their terms and conditions, and subject to all of the rights and
3 defenses of the counterparties arising under those terms and conditions. These rights are not "interests
4 in property" which can be stripped away under 11 U.S.C. § 363(f).

5 **VIII. CONCLUSION**

6 DACA submits that in view of the defective notice, the apparent failure of the Debtor to market
7 these assets to potentially interested parties, and the lack of any concrete reason for haste, the auction
8 be moved to April 10, with the hearing to follow shortly thereafter. In the interim, DACA can obtain
9 the information necessary to bid and seek the consent of the Direct Lenders to a transfer of the loan
10 servicing rights, contingent upon DACA being the successful bidder. DACA's success in obtaining
11 these consents will determine to what extent it is prepared to bid.

12
13 DATE: March 20, 2007

KIRBY & MCGUINN, A.P.C.

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15 By:  /s/
16 Dean T. Kirby, Jr. Attorneys for
17 Debt Acquisition Company of America V
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